

March 2, 2012

Anthony Lewis
General Counsel
California Technology Agency
1325 J Street, Suite 1600
Sacramento, CA 95814

Re: Your Request for Informal Assistance
Our file No. I-12-024

Dear Mr. Lewis:

This letter responds to your request for advice regarding the post-governmental employment provisions of the Political Reform Act (the “Act”).¹

This letter is based on the facts presented in your request. The Commission does not act as a finder of fact when issuing advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Our advice is applicable only to the extent that the facts provided to us are correct and all material facts have been provided.

Because your question is general in nature and you do not refer to any specific appearance before or communication with your state administrative agency, we are treating your request as one for informal assistance.²

QUESTION

Do the post-governmental employment provisions of the Act prohibit Andy Nielsen, a former Telecommunications Systems Manager II (Supervisor) for the California Technology Agency (“CTA”) from appearing before or communicating with CTA regarding a contract that he previously worked on while employed by CTA?

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

CONCLUSION

The one-year ban has expired, and it will no longer restrict Mr. Nielsen's appearances before or communications with CTA. With regard to the permanent ban, we have found generally that proceedings to draft a contract or agreement are separate from proceedings involving implementing or amending the same plan or agreement. However, because Mr. Nielsen participated in the implementation of the contract in question as an employee of CTA, he may not "switch sides" and participate in further implementation of the contract on behalf of the vendor.

FACTS

You are general counsel of CTA and you are writing to request advice concerning the post-governmental employment restrictions of the Act. Mr. Nielsen, a former telecommunications supervisor with CTA left his position with the agency on January 10, 2011, in order to work for one of the agency's vendors. Prior to his separation from CTA, he had primary responsibility for a contract with the vendor in question, including drafting and awarding contracts, managing projects, monitoring the vendor's performance, and approving invoices.

Mr. Nielsen was involved in awarding of the contract to the vendor, and later, the deployment and implementation of the contract for a three-month period from October 2010 through December 2010.

Mr. Nielsen has observed the one-year ban and is seeking to represent the vendor regarding the contract that he had previously worked on for CTA involving the same vendor. He wishes to represent the vendor on this contract, including attending meetings with CTA.

You wish to know whether the permanent ban would prohibit Mr. Nielsen from representing the vendor in ongoing phases, or the implementation of the contract.

ANALYSIS

Officials who leave state service are subject to two types of post-governmental employment provisions under the Act, colloquially known as the "revolving door" prohibitions. We discuss your question under each of these provisions.

- **One-Year Ban:** The "one-year ban" prohibits a state employee from appearing before or communicating with, for compensation, his or her former agency for the purpose of influencing certain administrative or legislative action or influencing certain proceedings. (See Section 87406; Regulation 18746.1.)

The one year ban applies only to appearances or communications made within 12 months of leaving state office or employment and made before or with an agency the official worked for or represented (or an agency under the budgetary or appointive control of the agency the official

worked for or represented) during the 12 months before leaving state office or employment. (Regulation 18746.1(b)(2) and (b)(6).) Based on the facts you have provided, Mr. Nielsen left his position with the CTA over 13 months ago, on January 10, 2011. Accordingly, the one-year ban has expired, and his appearances before or communications with the CTA are restricted only if they fall under the permanent ban as described below.

- **Permanent Ban:** The “permanent ban” prohibits a former state employee from “switching sides” and participating, for compensation, in any specific proceeding involving the State of California or assisting others in the proceeding if the proceeding is one in which the former state employee participated while employed by the state (See Sections 87401-87402; Regulation 18741.1).

The permanent ban is a lifetime ban and applies to any judicial, quasi-judicial, or other proceeding in which Mr. Nielsen participated while he served as a state administrative official. “‘Judicial, quasi-judicial or other proceeding’ means any proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in any court or state administrative agency . . .” (Section 87400(c).) Additionally, an official is considered to have “participated” in a proceeding if he or she took part in the proceeding “personally, and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation, or use of confidential information . . .” (Section 87400(d).)

“The permanent ban does not apply to a ‘new’ proceeding even in cases where the new proceeding is related to or grows out of a prior proceeding in which the official had participated. A ‘new’ proceeding not subject to the permanent ban typically involves different parties, a different subject matter, or different factual issues from those considered in previous proceedings.” (*Rist* Advice Letter, No. A-04-187.) New contracts with the employee’s former agency in which the former employee did not participate are considered new proceedings. (*Leslie* Advice Letter, No. I-89-649.) A new contract is one that is based on new consideration and new terms, even if it involves the same parties. (*Ferber* Advice Letter, No. I-99-104; *Anderson* Advice Letter, No. A-98-159.) In addition, the application, drafting, and awarding of a contract, license, or approval is considered to be a proceeding separate from the monitoring and performance of the contract, license, or approval. (*Anderson, supra*; *Blonien* Advice Letter, No. A-89-463.)

Under the Act, the contract between CTA and the private sector company is considered a “proceeding” involving a specific parties, and it appears that Mr. Nielsen has “participated” in this proceeding by drafting and approving the contract and managing and implementing the project created by the contract.

We have found generally that proceedings to draft a plan or agreement are separate from proceedings involving implementing or amending the same plan or agreement. (See *Christopher* Advice Letter, A-11-163.)

However, because Mr. Nielsen participated in the implementation of the contract in question as an employee of CTA, he may not “switch sides” and participate in further implementation of the contract on behalf of the vendor.

The Act’s permanent ban would prohibit Mr. Nielsen from making any appearance before or communication with any officer or employer of any state administrative agency for the purpose of *influencing*, as defined in Regulation 18746.2, the proceeding in which he previously participated. (Regulation 18741.1(a)(3).) Generally, Regulation 18746.2 provides that an appearance or communication is for the purpose of influencing if “made for the principal purpose of supporting, promoting, influencing, modifying, opposing, delaying, or advancing” an action or proceeding.³

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Emelyn Rodriguez
Counsel, Legal Division

ER:jgl

³ Moreover, Regulation 18746.2 provides that “[a]n appearance or communication includes, but is not limited to, conversing in telephone or in person, corresponding with in writing or by electronic transmission, attending a meeting, and delivering or sending any communication.”